

MINORITY MEDIA AND TELECOMMUNICATIONS COUNCIL

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August 25, 2003

Hon. Michael Powell
Hon. Kathleen Abernathy
Hon. Jonathan Adelstein
Hon. Michael Copps
Hon. Kevin Martin
Federal Communications Commission
445 12th Street S.W.
Washington, D.C. 20554

Dear Chairman Powell and Commissioners:

RE: Processing of Broadcast Applications

Last week, the Commission elected not to stay the Report and Order in MB Docket No. 02-277) FCC 03-127 (released July 2, 2003),^{1/} and decided instead to create the Localism Task Force. We endorsed the Task Force and urged the Commission to receive its final report and the final report of the Advisory Committee on Diversity in the Digital Age before implementing new media ownership rules.^{2/}

^{1/} Earlier in the proceeding, some Members of Congress urged the Commission to delay the issuance of a report and order until the Commission released the draft rules for public comment. Other Members of Congress urged the Commission to rule immediately. As a compromise, we requested the Commission to conclude the proceeding on whatever date the Commission felt appropriate in the management of its calendar, while postponing the effective date until after reconsideration proceedings had concluded. In this way, we hoped that the rules would not take effect before the Commission could have a chance to improve them on reconsideration, as often happens. See Letter to Chairman Powell, April 21, 2003; Letter to Chairman Powell, April 28, 2003, pp. 22-23. The R&O omits any mention of our request.

^{2/} See "MMTC Applauds FCC Localism and Diversity Initiatives," August 20, 2003 ("[t]he FCC's Localism Task Force...will help the FCC ensure that TV and radio stations continue to meet local community needs even as the industry becomes more consolidated.... These initiatives to promote diversity and localism are well thought out and constructive. They deserve the full support and participation of the civil rights and public interest communities. MMTC urges the Commission to review the final reports of the Diversity Committee and the Localism Task Force before fully implementing its new media ownership rules.")

Efforts to obtain a stay and to reverse the Report and Order remain pending in the courts and in Congress, and we believe these efforts will ultimately succeed. In the meantime, an unprecedented volume of transactions is likely to be filed with the Commission. Some of these transactions will be harmless from a public interest standpoint, but others could be problematic, locking up ownership of valuable assets and placing them out of the reach of minorities, women, the disadvantaged and new entrants.^{3/}

To address these circumstances, we propose the creation of three application processing tracks, which would be used during and after the proceedings on reconsideration and appeal, irrespective of their outcome:

Track 1 (expedited) would apply to transactions which would foster diversity. In particular, applications which would break up a combination,^{4/} or which would increase ownership of broadcast stations by socially and economically disadvantaged businesses ("SDBs"),^{5/} would be placed on this fast track. These applications would go on public notice immediately and, if unopposed, the applications would be granted immediately on circulation by the full Commission.^{6/} Taken together, these steps could eliminate about a month from the waiting time between the filing of a Form 314 or 315 application and the closing of the deal.^{7/} That much expedition is very substantial in the context of the delicate issues often arising in station transactions. Thus, expedited processing would place in the hands of new entrants, including many minorities, a substantial incentive to offer to sellers.^{8/}

^{3/} As we will explain in the petition for reconsideration we will file, entrepreneurs who belong to historically excluded groups, particularly minorities, will gain little or nothing from any of the specific deregulatory steps taken in the Report and Order. On the other hand, their business competitors, whose two-generation headstart included the privilege of not facing minority competition, will quickly secure the most valuable available stations and absorb them into horizontal and vertical combinations. Once locked up in this way, these stations will almost never be re-sold, since the business plan of a vertical or horizontal integrator seldom contemplates the disaggregation of a core asset.

^{4/} Examples of qualifying transactions would be those that reduce the size of a local ownership combination, or transactions that reduce a network's national audience reach. These types of pro-diversity transactions parallel those contemplated by former 26 U.S.C. §1071, which formed the basis of the tax certificate policy.

^{5/} One useful definition of SDBs is found in Senator McCain's Telecommunications Ownership Diversification Act of 2003, S.267 (introduced January 30, 2003).

^{6/} See 47 C.F.R. §1.103(a) (Commission may establish earlier effective date than is customary); see also 47 C.F.R. §0.283(c) (Bureau can refer to the full Commission matters presenting "novel questions of law, fact or policy that cannot be resolved under existing precedents or guidelines.")

^{7/} The full Commission would also act on these applications if they are opposed, thereby eliminating the several months of delay attendant to proceedings on an application of review. See generally 47 C.F.R. §1.115.

^{8/} There is sound precedent for this approach. See Statement of Policy on Minority Ownership of Broadcast Facilities, 68 FCC2d 979, 983 (1978) ("[a]pplications by parties seeking relief under our tax certificate and distress sales policies can be expected to receive expeditious processing.") All seven commissioners endorsed the 1978 Policy Statement.

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Track 2 (routine) would apply to transactions which have no material impact on diversity one way or the other. Most applications would fall into this category, and they would be processed by the staff in the customary way. These transactions would include some modest-sized and nonaggressive ownership configurations that would not have been permissible under the rules in effect June 1, 2003 but which would be allowed under the new rules adopted in the Report and Order. These transactions would be approved with a condition specifying that if the Report and Order is vacated in pertinent part, the buyer must come into compliance with the surviving rules within a reasonable time.

Track 3 (full file review) would apply to transactions that could materially reduce diversity. These would include transactions for which, under the rules in effect on June 1, 2003, a waiver would have been necessary and might not have been routinely granted. After the public comment period specified in 47 U.S.C. §309(d)(1) is concluded, these applications would be carefully examined to discern their potential impact on diversity.^{9/}

These processing criteria are not a substitute for a stay; rather, they are a means of managing the Commission's resources in order to advance the pro-diversity objectives of the Communications Act irrespective of the fate of the Report and Order. Further, these criteria are race-neutral.^{10/} We believe that these processing criteria are worthy of the support of those who favor and those who oppose the rules adopted on June 2, 2003.

Sincerely,

David Honig

David Honig
Executive Director

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^{9/} The model for staff review of a pending broadcast application was provided in Bilingual Bicultural Coalition on the Mass Media v. FCC, 595 F.2d 621, 629-30 (D.C. Cir. 1978).

^{10/} Compare Lutheran Church-Missouri Synod v. FCC, 141 F.3d 344 (D.C. Cir.), petition for rehearing denied, 154 F.3d 487, petition for rehearing en banc denied, 154 F.3d 494 (D.C. Cir. 1998) (application processing criteria tied to stations' employment levels regarded as pressuring stations to hire minorities). Our proposed Track 1 would be linked to disadvantage rather than race.